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No. 87-1437

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this court should decline discretionary review of the Nevada Supreme Court opinion denying jury trials to persons charged with misdemeanor Driving Under the Influence (DUI) offenses in the municipal courts of the State of Nevada for want of a substantial federal question in view of the long-standing threshold between "petty" and "serious" offenses where the maximum authorized penalty is six months in jail.

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OPINIONS AND JUDGMENTS DELIVERED BELOW

The Petitioners, Melvin R. Blanton and Mark D. Fraley, seek certiorari from this Court to review the decision of the Supreme Court of Nevada reported in *Blanton v. North Las Vegas Municipal Court*, 103 Nev. Adv. Op. 135, 748 P.2d 494 (December 31, 1987) (reprinted in Appendix A to the Petition for Writ of Certiorari). The state supreme court consolidated

eleven cases on appeal or petition in various forms concerning the issue of jury trials in misdemeanor DUI prosecutions in Nevada municipal courts. The Supreme Court of Nevada denied the claim that there was any right to a jury trial for a misdemeanor DUI in Nevada where the maximum authorized penalty is six months in jail and a $1,000 fine. No petition for rehearing was filed by any party in the Supreme Court of Nevada.

JURISDICTIONAL STATEMENT AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A.

JURISDICTIONAL STATEMENT

Petitioners attempt to invoke the jurisdiction of this court under 28 U.S.C. Section 1257. Respondent submits that this Court should exercise its discretion under Rule 17.1 of the Rules of the Court by refusing to review the decision of the Supreme Court of Nevada. There is a lack of a substantial federal question in this case in view of the well established principle that no jury trial right exists for petty offenses where the maximum authorized penalty is six months in jail.

B.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petition for Writ of Certiorari has set forth the pertinent text of the Federal and Nevada Statutes which are implicated in this case. Additionally, the United States Constitution, Article III, Section 2, paragraph 3, and the Sixth Amendment, as applied to the

states through the Fourteenth Amendment, are involved.

The text of the pertinent portions of the above Constitutional provisions are as follows:

Art. III, Section 2, paragraph 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . "

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

SUMMARY OF ARGUMENT

This Court should decline to review the decision of the Supreme Court of Nevada. Whether to grant review is a matter of judicial discretion, to be invoked only where special and important reasons exist for so doing, according to the provisions of Rule 17.1 of the Rules of the Court.

The Petition fails to present an important question of federal law in need of settlement by this Court. There is a want of a substantial federal question because of the well-defined nature of the dividing line between what constitutes a "petty" offense versus a "serious" offense. The Nevada Supreme Court decision denying jury trials for misdemeanor DUI offenses in Nevada where the maximum authorized penalty is six months in jail and a $1000 fine is in accord with pronouncements from this Court during the past twenty

years defining a petty offense as one subject to no more than a six month jail sentence.

Moreover, the Court rejected a request to review the identical issue presented by Petitioners when it dismissed an appeal last year for want of a substantial federal question. No new arguments or authorities arising since that decision have been cited by Petitioners.

The Ninth Circuit Court of Appeals has rendered decisions which on their face appear to conflict with the Nevada Supreme Court decision in this case. However, the Fifth Circuit Court of Appeals issued an opinion, *en banc*, on March 17, 1988 which, *inter alia*, explains why those Ninth Circuit decisions are an anomaly and contradict firmly established principles enunciated by this Court regarding when the right to a jury trial attaches.

ARGUMENT

A basic principle of law deeply rooted in the historical practice of the Colonies and the original states declares that, under the Constitution, no person is entitled to a trial by jury for a petty offense. *Baldwin v. New York*, 399 U.S. 66 (1969). This Court has refined, through a series of decisions emanating with *Duncan v. Louisiana*, 391 U.S. 145 (1968), a clear-cut definition of "petty offense": an offense which is subject to a maximum term of incarceration of six months or less. *Baldwin, supra; Frank v. United States*, 395 U.S. 147 (1969); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974).

As recently as April of 1987 this Court dismissed an appeal for want of a substantial federal question in *Bairnsfather v. Louisiana*, ___ U.S. ___, 107 S.Ct. 1620, 95 L.Ed.2d 195 (April 6, 1987), which offered the same issue for review put forth by Petitioners herein. Bairnsfather requested a jury trial when he was charged in the Louisiana courts with second offense Driving While Intoxicated (DWI), mandating a thirty day to six month jail sentence and a mandatory $300 to $500 fine. Bairnsfather presented essentially the same issues and arguments as Petitioners would in support of their contention that they are entitled to a jury trial under the Sixth Amendment. The thrust of the argument is that certain collateral consequences attendant to a DWI conviction, along with minimum mandatory punishment, elevate a "petty" offense into a "serious" offense requiring a jury trial under the Constitution. See *Landry v. Hoepfner*, 840 F.2d 1201, 1210-1211 (5th Cir. *en bank* 1988).

Petitioners advanced no new arguments or authorities arising since the Court dismissed the *Bairnsfather* Appeal to convince this Court to grant a review of their case. Moreover, " . . . by dismissing the appeal for want of a substantial federal question, the Supreme Court in *Bairnsfather* did reach and so resolve the substantive merits of the appeal, ... *Bairnsfather* is thus a ruling on the merits with precedential value, albeit with less such value than an opinion of the Court after full briefing and argument." [Citations omitted]. *Id.*, at 1212.

In *Landry, supra,* the Fifth Circuit Court of Appeals, *en banc*, on March 17, 1988, reversed a decision of one of its panels, *Landry v. Hoepfner*, 818 F.2d 1169 (5th Cir. 1987) and hold that the United States Constitution does not require the states to provide the right of trial by jury for a first offense DWI. While noting that the maximum penalty prescribed was six months' imprisonment and a five hundred dollar fine, the Fifth Circuit found that this " . . . does not exceed that appropriate for 'petty' offenses under *Baldwin v. New York*, ..." *Landry, supra,* at 840 F.2d 1202.

Most importantly, the Fifth Circuit declared that the United States Supreme Court . . .

> " . . . has *never* held or stated any crime is a 'serious' rather than a 'petty' offense on the basis of any criteria other than whether its maximum authorized confinement exceeded six months or whether it was indictable at common law. Otherwise put, the Court has never identified any particular offense as being nonpetty which was both not indictable at common law and carried a maximum authorized confinement of not more than six months." [Emphasis original]. *Id.*, at 1209.

Hence, the Petitioners' contention that certain minimum mandatory punishment, which is well under six months in jail, combined with various collateral consequences such as driver license revocation, social stigma, and increased insurance premiums, elevate a DUI from an otherwise petty offense into a serious offense allowing a right to a jury trial is without merit and clearly fails to present an important question of federal law. The law in this area has been settled by

this Court and therefore the Petition does lack a substantial federal question.

Further support for the Respondent's position that the Court should refuse to grant review of the Nevada Supreme Court decision can be found in *Frank, supra*, 395 U.S. at 148:

> "In determining whether a particular offense can be classified as 'petty', this Court has sought objective indications of the seriousness with which society regards the offense. . . .The most relevant indication . . . is the severity of the penalty authorized for its commission."

The Court also noted in *Baldwin* that " . . . we have sought objective criteria . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty." *Baldwin, supra,* 395 U.S. at 68. Petitioners seek to establish a new order whereby courts apply subjective criteria, such as collateral consequences of a conviction, to determine the seriousness of an offense on an *ad hoc* basis. The result would produce judicial opinions driven by the personal predilictions of the jurist authoring such an opinion. *Baldwin* and *Frank* counsel against this approach.

In *Landry*, the Fifth Circuit emphasized the point that this Court has refined the determination of when an offense is petty or serious, and therefore when a Constitutional right to a jury trial attaches: "Since Baldwin, the Court has spoken *only* in terms of the length of possible confinement as establishing the dividing line between 'petty' and serious offenses." [Emphasis original]. *Landry v. Hoepfner*, 840 F.2d at

1208. Therefore, Petitioners' reliance on certain collateral consequences and minimum mandatory punishment is misplaced and the Petition fails to present the requisite important question of federal law. Their argument runs contrary to a long line of decisions by the Court that the determinative factor is the maximum authorized period of confinement. See *Landry, supra,* at 1215-1216. Again, in *Landry*, the Fifth Circuit declared the following with reference to dismissal by this Court of the *Bairnsfather* appeal last year for want of a substantial federal question: "Clearly there is nothing in *Bairnsfather* which is in tension with or breaks new ground respecting *Duncan, Frank, Baldwin*, or *Codispoti*." *Id.*, at 1212.

The Nevada Supreme Court decision in *Blanton, supra,* strictly follows the principles delineated in the above cases from this Court. The opinion (reprinted in full in Appendix "A" to the Petition for Writ of Certiorari) draws heavily from *Baldwin* and concludes that the federal constitution does not require it to overturn the decision in *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983), which held that " . . . under the statutory penalties for DUI in Nevada, the United States Constitution does not guarantee the right to jury trials in misdemeanor DUI cases." (Appendix "A" to the Petition, page 32; also found at 748 P.2d at 501).

Petitioners place great reliance on three federal cases in support of their position: *United States v. Craner*, 652 F.2d 23 (9th Cir. 1981); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978); and *Bronson v. Swinney*, 648 F.Supp. 1094 (D. Nev. 1986), (appeal pending, 9th Cir.). Yet, the Nevada Supreme Court was

mindful of these cases and distinguished them as an " . . . unnecessary and unwarranted expansion of the Supreme Court's holding in Baldwin." *Blanton, supra,* at 500 (also in Appendix "A" to the Petition, page 31). *Landry, supra,* also distinguished the *Craner* case and found no convincing body of lower federal court decisions which have developed a clear consensus contrary to the plain meaning of the Supreme Court cases. *Landry, supra,* at 1214-1215.

Compare *Rife v. Godbehere*, 814 F.2d 563 (9th Cir. 1987), a prosecution for misdemeanor DUI from the Arizona state court system which held that such an offense became a serious offense allowing a jury trial right where the maximum fine had been increased from $500 to $1000, even though the maximum term of incarceration remained at six months.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to grant certiorari and summarily affirm the opinion of the Supreme Court of Nevada. Alternatively, this Court should deny a review of the Nevada Supreme Court decision and dismiss the Petition.

Respectfully submitted,

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